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IN THE

Supreme Court of the United States

October Term, 1967.

No. ~~1346~~ 121

JOSEPH H. DONLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. OPINIONS BELOW.

(A) The opinion of the United States Court of Appeals for the Third Circuit bears the date January 17, 1967, is a Per Curiam opinion, and is not yet reported. A copy is appended hereto (1A, *infra*).

(B) The opinion of the United States Court of Appeals for the Third Circuit as to the Petition for Rehearing bears the date March 3, 1967, and is not yet reported. A copy is appended hereto (3A, *infra*).

(C) The opinion of the United States District Court for the District of Delaware bears the date July 14, 1966, and is not yet reported (Appellant's Appendix 29a).

II. JURISDICTIONAL GROUNDS.

This petition seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit with respect to its judgment dated and entered on March 29, 1967, which judgment affirmed the judgment of the United States District Court for the District of Delaware of August 4, 1966.

Jurisdiction of this Court is predicated upon 62 Stat. 928(1) (28 U. S. C. A. § 1254(1)).

III. ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

On April 7, 1967, Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States ordered that the time for petitioner filing a petition for writ of certiorari be extended to and including May 3, 1967, without prejudice to the Court's consideration as to whether the application was timely received.

IV. QUESTIONS PRESENTED.

A. Were the defendant's rights at trial substantially prejudiced by the failure of the Court to require production of requested reports for in camera examination?

B. Were the defendant's rights at trial substantially prejudiced by the refusal of the Court to order certain requested memoranda be furnished defendant for his inspection and use in cross-examination?

C. Were the defendant's rights at trial substantially prejudiced by the receipt into evidence of speculative testimony identifying code names as alleged numbers writers of the defendant?

D. Were the defendant's rights at trial substantially prejudiced by the refusal of the Court below to permit impeachment testimony in evidence?

V. CONSTITUTIONAL PROVISIONS, ETC. INVOLVED IN THE CASE.

Article V, Amendments to the Constitution of the United States. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI, Amendments to the Constitution of the United States. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U. S. C. A. § 3500, the text of which is set forth in the appendix hereto (4A, *infra*).

VI. STATEMENT OF THE CASE.

On May 7, 1965, the Grand Jury filed an Indictment charging the defendant with violations of 26 United States Code 7201 and 7203. In Count I, the defendant was charged with willfully failing to pay the excise tax required by 26 United States Code 4401 on wagers accepted in the month of June 1964. In Count II, the defendant was charged with willfully failing to pay the special occupational tax required under 26 United States Code 4411. In Count III, the defendant was charged with willfully failing to register and furnish information to the District Director of Internal Revenue as required by 26 United States Code 4412.

On May 17, 1965, the defendant appeared with counsel and entered a plea to each Count of not guilty.

On May 24, 1965, trial commenced in the United States District Court for the District of Delaware. The trial concluded on May 27, 1965, the jury at that time returning verdicts of guilty on each Count.

On June 21, 1965, a Motion was filed on behalf of the defendant for Judgment of Acquittal, or in the Alternative, for New Trial.

On July 14, 1966, the above Motion was denied by the Honorable Caleb R. Layton, 3rd, in an Opinion even date.

On August 4, 1966, the defendant was senteced to be incarcerated for the period of one and one-half years as to the verdict under Count I. As to Counts II and III, the defendant was sentenced to be incarcerated for one year each as to each Count, these sentences to run concurrent one with the other, and to run concurrent with the sentence on Count I. Judgment and commitment were entered.

On August 10, 1966, a Notice of Appeal was filed on behalf of the defendant.

On January 6, 1967, the Appeal was argued by Counsel before the United States Court of Appeals for the Third Circuit.

On January 17, 1966, the United States Court of Appeals for the Third Circuit filed its opinion affirming the judgment of the United States District Court for the District of Delaware.

On February 14, 1967, appellant filed a Petition for Rehearing.

On March 3, 1967, the Petition for Rehearing was denied with an opinion filed the same date.

This is appellant's petition for a writ of certiorari.

Statement of Facts.

During May and June, 1964, defendant Donlon was placed under surveillance by Agents of the Intelligence Division, Internal Revenue Service. Defendant was observed to follow a routine which included a series of visits to various locations in and around the City of Wilmington during the morning, a short stop at his own store, Don's Gift Shop, and a return to his home. In the afternoon, he would return to his own store. In the course of this routine, he was allegedly observed to have conducted a series of transactions with other persons involving slips of paper or money or both.

On June 1, 1964, an employee of the Audit Division of the Internal Revenue Service visited defendant and allegedly explained the requirements of the Federal Wagering law including stamp purchase, registration requirements, and the 10% excise tax on wagers. Defendant neither purchased the stamp, registered, nor paid the required excise tax on gross wagers.

On Friday, June 19, 1964, pursuant to search warrants issued for that purpose, a group of Federal Agents conducted a search of defendant's house. They found three pieces of paper with names and columns of numbers in a specially constructed shelf containing a secret hiding place. They also found a slip of paper with names and columns of numbers under the cushion of defendant's chair. The

United States takes the position that these sheets of paper represented the records of defendant's wagering business during the period of June 13 to June 19, 1964, disclosing an operation involving approximately sixty numbers writers employed by defendant.

Defendant was then arrested, pursuant to a warrant, and searched. He was found to have $5,875.00 in cash on his person. He stated that the currency was his, and said that $333.00, taken from one particular pocket, was proceeds from his store, Don's Gift Shop. When questioned about the remainder of the money, he refused to answer. He denied being in the business of accepting wagers. He denied knowledge of the hiding place in the shelf, of the papers it contained, or of the sheet of paper under the cushion of his clair. He also refused to answer when questioned further.

During the surveillance and investigation, the agents had attempted on more than one occasion to have the defendant accept work from a purported numbers writer, who was in fact an informer. Although the ploy had been successful in all concurrent investigations, the defendant Donlon refused to accept any of the offered work.

VII. ARGUMENT.

A. The Defendant's Rights at Trial Were Substantially Prejudiced by the Failure of the Court to Require Production of Requested Reports for in Camera Examination.

Agent Toscano testified on his direct examination that during the months of May and June, 1964, he investigated at least four Wilmington wagering businesses including the one allegedly operated by the defendant. In connection with these investigations, including his investigation of the wagering business allegedly operated by the defendant, Toscano obtained and studied banking records (10a). After examining Government Exhibits 2, 3, 4 and 5 (previously identified by the government as banking records in the defendant's possession when he was arrested), Toscano testied that these were similar to banking records with which he was familiar (11a). He stated further that the amounts of money which appear to be reflected by the records were consistent with the average "weekly take" of a 60 writer banking operation (11a; 12a). The United States Attorney represented to the Court that the purpose of the direct examination was to demonstrate that the records found in the defendant's possession were banking records (12a). Finally, Toscano testified that the amount of money found on the person of the defendant when arrested was consistent with his being a banker (12a).

There is no doubt that the subject matter of Toscano's testimony was the identification of the defendant Donlon as a numbers banker during the months of May and June, 1964, a function the jury had to be convinced the defendant discharged during the months in question as a condition precedent to their return of guilty verdicts.

It is also clear that one of the subjects of Toscano's direct examination was that he had investigated a gambling

business allegedly operated by the defendant in May and June of 1964.

On cross-examination, with immediate reference to this investigation or surveillance admittedly conducted by Toscano, he was asked whether he made or kept any records or memoranda. Upon receipt of an affirmative answer, application was made to the Court for production of these records and memoranda pursuant to the provisions of 18 U. S. C. § 3500, the Jencks Act (12a). Defense counsel was assured promptly by the Court that the requested material would be provided (13a).

Certain of these materials requested were furnished by the government and certain others were refused (15a-28a, 36a-40a). The basis of the refusal was the government assertion that these were unrelated to the subject matter of Toscano's direct examination (18a, 22a).

The impasse was brought to the attention of the Court with the request that the Court order production of all memoranda and records of Toscano's May and June surveillances of the defendant Donlon for the Court's own inspection. After lengthy discussion, only two memoranda were produced for the Court's inspection. These were the only memoranda of which the defendant had specific knowledge. The defendant had reason to believe and continues to so believe that the Government was then in possession of other memoranda of Toscano relating to this specific surveillance. The Court refused to order production of any further material unless counsel could identify specifically the matter sought. The materials requested were those relating to the surveillance which Toscano stated on direct examination he had conducted. The limits of the request were made abundantly clear by counsel to no avail.

The defendant petitions that the sentence be vacated and the case remanded to the District Court for further hearing as required by 18 U. S. C. § 3500(c). The Court below erred in refusing defendant's request for an in camera inspection of requested records and memoranda

of witness Toscano of his May, June, 1964, investigation of the defendant. *United States v. Keig,* 320 F. 2d 634, 637 (7th Cir., 1963); *Ogden v. United States,* 303 F. 2d 724, 737 (9th Cir., 1962); *Bary v. United States,* 292 F. 2d 53, 58 (10th Cir., 1961); *Holmes v. United States,* 271 F. 2d 635, 638 (4th Cir., 1959).

B: The Defendant's Rights at Trial Were Substantially Prejudiced by the Refusal of the Court to Order Certain Requested Memoranda Be Furnished Defendant for His Inspection and Use in Cross-Examination.

The witness Toscano stated during his direct examination that he conducted an investigation or surveillance of alleged wagering activities of the defendant during the months May and June of 1964. Having admitted that he compiled memoranda in connection with his surveillance, the defense request that these be produced for inspection and possible use in preparing cross-examination was initially granted by the Court. The Court later reversed itself having determined the material not to be producible. The basis for its decision is unclear both in the record and in the opinion. Two grounds are discussed; that the matters sought do not relate to the subject matter of Toscano's direct testimony, and that they could not serve to impeach (16a-28a, 36a-39a). It appears to the writer that the Court gives most prominence to its determination that these materials could not impeach the witness. If this was the basis for decision, the defendant was substantially prejudiced by the Court's error in considering the question of impeachment. The sole determination the Court is permitted by the statute is that of relationship to direct testimony. If the Court upon its in camera examination determines that the memoranda sought do not relate to subject matter of the witnesses' direct examination, the Court should refuse to order production. On the other hand, should the Court determine after in camera inspec-

tion that some or all records requested do so relate it must order production. The question of impeachment does not come before the Court for a ruling except in passing upon government objection to cross-examination the purpose of which is to impeach. "The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant." *Ogden v. United States,* 303 F. 2d 724, 737 (9th Cir., 1962). "Whether the statements so relate to prosecution testimony is a decision which is vested not in the government but in the trial judge with full opportunity for appellate review. Once this question has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States,* 367 U. S. 203, 258, 81 S. Ct. 1469, 1501 (U. S. S. C., 1961).

The Court concluded in its opinion that Toscano testified only as to two matters; his identification of exhibits as being similar to banking records, and his computation of the total amount of wagers represented by these records. This conclusion is error in that it has already been shown that Toscano conducted a surveillance of the defendant in May and June of 1964 and that his expertise in the Wilmington area was based to some extent on this surveillance. These matters were testified to on direct examination.

It is submitted respectfully that the Court's view of the concept "subject matter" was oppressively restrictive. In *Ogden v. United States,* 303 F. 2d 724, 740 (9th Cir., 1962), the Court, in remanding for further hearing, described portions of a statement as

> ". . . relevant to the subject matter of cross-examination only in the broadest terms, but the test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to. The problem is not whether a question framed precisely in the terms of the withheld information would relate to

> the subject matter of the direct examination, but rather whether the withheld material might be useful in framing questions which would be relevant to that subject matter . . . . Doubts are to be resolved in favor of disclosure . . . . ."

The District Court in its opinion in *United States v. Hilbrich,* 232 F. Supp. 111, 129 (D. C. N. D. Ill., E. D., 1964) recommended that ". . . a very liberal interpretation of the cognomen 'related' should be used."

As stated earlier, only two records were produced by the government. The Court failed to require of the United States Attorney any further production since, as stated in the opinion, "The government insisted that all relevant Jencks material had been produced . . ." (37a). Having shifted its own burden to the prosecution, the Court clearly erred in not making its own determination. *United States v. Chapman,* 318 F. 2d 912, 914 (2nd Cir. 1963); *Bary v. United States,* 292 F. 2d 53, 58 (10th Cir., 1961).

Although the Court's statements as to whether the witness could be successfuly impeached may be debated prematurely at this time, the defendant will set forth his position in regard to the relevant portion of the opinion (37a-39a).

The Court stated that Toscano testified only to his interpretation of records found at the defendant's home, that these records were similar to bankers records, that the money on defendant's person was indicative of banking activities, and to his computation of the total amount of wagers reflected in these records. The Court continued by stating that Toscano did not conclude that the defendant was a numbers banker. On the other hand, defendant contends that the necessary inference and intention of Toscano's direct examination was that the defendant was a numbers banker during the relevant period of time.

The Court further found the defense motion without merit since defendant was aware of some of the material

from other sources, from the affidavit attached to a search warrant. This contention, of course, has no bearing with respect to the materials which were not produced for the Court. As for the two records which were produced for the Court, the Court made no attempt to satisfy itself whether the search warrant affidavit contained, more, less, or different material than that in the agents' records.

Finally, the Court found no impeachment would be possible—at least as to the two records it examined—in that they dealt with the agents' surveillance during May, 1964, and the government had been precluded from offering testimony as to that surveillance. The defense position was then, as now, that the government had not chosen to accuse the defendant of May violations, and, as a result, had limited itself in the offer of proof. The limitation of time that determines the admissibility of evidence offered against the defendant, a party, to establish guilt, differs from and is more narrow than that controlling as to the impeachment of a witness. For example, had the defendant taken the witness stand and testified that he had not been in Wilmington during May 4, 1964, the Court's exclusory ruling would no longer have prohibited government testimony of the May surveillance.

A conceptual difference exists in the relationship between the time of events to guilt as charged and the time of events to the credibility of a witness. The former is delimited by the indictment; the latter, by considerations of relevance and logic. "Impeaching evidence is admitted only for the purpose of attacking the credibility of the witness and not as substantive evidence of its truth . . .", such as is evidence offered to convict. *Wharton's Criminal Evidence,* twelfth edition, Volume III, 1965, at page 317.

The defendant should be permitted to use the materials requested to impeach the witness. It is stated in *Wharton* (*supra,* 325) that "The defendant may prove any fact tending to show that a witness is a partisan of the state" and that "It is proper to admit evidence of any acts or

circumstances which are inconsistent with the relevant testimony of the witness" (*supra,* 330). If the ruling of the Court was correct that the defendant could not impeach by examining as to events occuring in May, 1964, because the government was precluded from offering evidence as to that month, this would mean, for example, that the witness could not be impeached by proof of his bad character or felony convictions previous to June 1964. To state it thus is to show the patent error of the Court.

C. The Defendant's Rights at Trial Were Substantially Prejudiced by the Receipt Into Evidence of Speculative Testimony Identifying Code Names as Alleged Numbers Writers of the Defendant.

Certain of the government exhibits identified as banking records of the defendant contained lists in code. Witnesses for the United States were permitted to testify that these initials and code names might represent numbers writers (3a-9a). The witnesses were permitted to go further and speculate as to the identity of some of these alleged writers.

The names suggested by the witnesses were of numbers writers widely and well-known in this community to be involved in policy writing.

This testimony was objected to and should have been refused by the Court at the outset because of its obvious and admitted speculative nature. Secondly, it should have been rejected as being too remote for purposes of relevancy in that no expert was able to testify that any of these writers were in fact involved in gambling operations during the period of time charged in the Indictment. Further, no expert was able to link any of these writers with the defendant.

With the highly speculative and remote character of this evidence, the jury was erroneously permitted to speculate upon the witness' own speculation. Attention must be drawn to Bullen's testimony. The witness was asked

whether any of the abbreviations "suggest" names of persons; he admitted that he was less familiar with persons in the business in Wilmington; he was asked again what names he thought the abbreviations "might represent"; he stated "They would indicate certain people to me, but they may not be these people" and further that certain initials or nicknames "could be" one person or another.

Not only was it error to permit government witnesses to offer testimony so speculative in nature as to be prejudicial for this reason alone, but error was compounded by permitting the witness Bullen to identify the records as those of a banker. The basic criteria for identifying these records as those of a banker inheres in the hopeful assertion by the expert witnesses that certain initials and code names "might represent" the names of numbers writers in a banking operation.

Thus, not only should this testimony of Bullen and Coen have been refused by the Court, but, with this out of the record, the testimony describing these records as those of a banker should have been stricken.

D. Conclusion.

It is respectfully submitted that the petition for certiorari be granted and the judgment of the lower court be reversed.

Respectfully submitted,

EMMETT J. CONTE, JR.,
Attorney for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16163

UNITED STATES OF AMERICA,

v.

JOSEPH M. DONLON,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued January 6, 1967

Before McLAUGHLIN, SMITH and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 17, 1967)

PER CURIAM.

Appellant was convicted of violations of the Federal Wagering Laws, 26 U. S. C. Sections 7201 and 7203.

We find not error under the trial circumstances in the Court's denial of appellant's requests for certain material, purportedly under the authority of the Jencks Act, 18 U. S. C. Section 3500, in one instance for the Court's inspection and in a second instance to be furnished defendant for his inspection and use on cross-examination. Also under the trial circumstances we find no substantial error in the admission of the identification testimony, the only remaining point advanced on this appeal.

The judgment of the District Court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16163

UNITED STATES OF AMERICA,

v.

JOSEPH M. DONLON,
Appellant.

(D. C. Criminal No. 1694)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: MCLAUGHLIN, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, of August 4, 1966, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

January 17, 1967.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16163

UNITED STATES OF AMERICA,

v.

JOSEPH M. DONLON,

Appellant.

SUR PETITION FOR REHEARING.

Present: STALEY, *Chief Judge* and MCLAUGHLIN, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

The sole contention of appellant's petition for rehearing is that our per curiam opinion heretofore filed in this appeal did not specifically mention a particular excerpt from the second and final point as argued on behalf of appellant. That item concerned the defense calling one of the Internal Revenue Agents as a witness and insisting on cross-examining him on a theory of impeachment. The Court, with counsel, explored the whole related area of evidence carefully, concluded that there was no impeachment basis presented and upheld the objection to the question. We have gone over the same ground at length. We find that the trial Judge at the very least was not clearly wrong in his ruling.

The petition for rehearing will be denied.

By THE COURT,

MCLAUGHLIN,
Circuit Judge.

Dated: March 3, 1967.

STATUTORY PROVISION INVOLVED.

18 U. S. C. A. § 3500.

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withhold-

ing and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.